85-1499

No. _____

Supreme Court, U.S.
FILED
MAR 10 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1986

LANDAHL, BROWN & WEED ASSOCIATES, INC.
Petitioner

v.

CITY OF CAPE CORAL
Respondent

WRIT OF PETITION OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

PETITION FOR WRIT OF CERTIORARI

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Questions Presented For Review

I. Whether the City of Cape Coral in the application of its zoning or building code, in refusing to permit Landahl, Brown & Weed Associates, Inc. to engage in construction under validly issued building permits in which Landahl, Brown & Weed Associates, Inc. had expended $266,000, effected a taking for which the Fifth Amendment requires the payment of money damages to compensate for such taking.

II. Whether the City of Cape Coral in the application of its zoning or building code, in refusing to permit Landahl, Brown & Weed Associates, Inc. to engage in construction under validly issued building permits in which Landahl, Brown & Weed Associates, Inc. had expended $266,000, engaged in an invalid exercise of the police power in violation of the due process clause of the Fourteenth Amendment and/or 42 U.S.C. § 1983.

List of Parties and Affiliates

A list of all parties to this proceeding are contained in the caption.

Landahl, Brown & Weed Associates, Inc. is not and has no parent subsidiary or affiliated company or organization.

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Opinions Below

The opinion of the Supreme Court of Florida, declining to accept jurisdiction, is not officially reported, and is reproduced at App. A.

The opinion of the Second District Court of Appeal of Florida is reported at 470 So.2d 25 (2nd DCA 1985). The opinion is reproduced at App. B.

Jurisdictional Grounds

The decision of the Second District Court of Appeal of Florida was rendered on May 8, 1985, and provided that it was not final until the time expired to file a rehearing motion, and if filed, determined. A motion for rehearing was filed, and denied on June 7, 1985.

The decision of the Supreme Court of Florida declining to accept jurisdiction was rendered and entered December 10, 1985.

This petition for writ of certiorari was filed within 90 days of the entry of the December 10, 1985 decision of the Supreme Court of Florida. Jurisdiction of this Court is based upon 28 U.S.C. § 1257(3).

Constitutional and Statutory Provisions Involved

Constitutional Provisions

Fifth Amendment to the United States Constitution:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment, Section 1, to the United States Constitution:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the priveleges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Code, Title 42:

§ 1983. Civil action for deprivation of rights.

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Statement of the Case

In early 1974 Landahl, Brown & Weed Associates, Inc. ("Landahl") purchased a building site in the City of Cape Coral zoned for multi-unit high rise construction. Following that purchase, he purchased six additional building sites in the City and began plans to build seven multi-unit high rise buildings on the seven sites in accordance with the then zoning of the property sites. In early 1975, Landahl obtained building permits for each of the seven sites from the City of Cape Coral to build the high rise buildings. After the permits were issued to Landahl, the City's building code was amended to prevent high rise buildings from being built in the City. Landahl's buildings aroused substantial public interest. During the construction by Landahl of the buildings, the City posted notice on each of the seven construction sites that construction was to terminate. The factual situation is slightly different for each of the sites, but it is correct to state, that at the time, the City stated it was stopping construction as sufficient construction had not begun under the permits within the time allowed for construction to start. However, the evidence was uncontroverted that as to two sites the date for construction to start had not arrived when construction was stopped by the City, and in regard to the other five sites the evidence centered around whether Landahl had engaged in sufficient construction such as to be called the actual start of construction.

The uncontroverted trial evidence was that Landahl had, *inter alia*, expended in cash $266,000 for construction at the time construction was stopped. The trial evidence was that the City revoked the building permits to prevent Landahl from completing the buildings pursuant to the permits issued under the old Code before it was amended in April 1975. After the permits were revoked, the City refused to allow construction to continue, although the City Code (Section 103.2) provides that if work is stopped on a building, the reason therefore shall be stated and an opportunity given to correct the problem for construction to commence again.

After the City continued to refuse to permit Landahl to engage in construction under the permits it had issued, Landahl filed an action alleging, *inter alia*, in the complaint:[1]

COUNT II
(VIOLATION OF CONSTITUTIONAL RIGHTS)

* * *

23. That in revoking the building permits issued to . . . (Landahl), . . . for the seven multi-unit, high-rise buildings in the City of Cape Coral, the (City) . . . failed to give the third party plaintiff notice of its actions and an opportunity to be heard in violation of due process, failed to provide or pay just compensation for the taking of private property, the property being taken and the permits being revoked by the arbitrary, capricious and malicious acts of the (City) . . . without just or proper cause or reason, and did interfere with the contract, agreement and arrangement between (Landahl) . . . and the City of Cape Coral evidenced by the building permits which had been issued by the City . . .

* * *

COUNT IV
(VIOLATION OF CIVIL RIGHTS)

* * *

27. That in revoking the building permits issued to (Landahl) . . . for the seven multi-unit high-rise buildings in the City of Cape Coral, the (City) . . . did violae 42 U.S.C. § 1983, 1985 in that they conspired to deprive the (Landahl) . . . of equal protection of the laws and of equal privileges and immunities.

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1. The pleading was a third party complaint; Landahl had been sued by its contractor and Landahl brought the City into the action by third party complaint.

The Landahl action requested $10,000,000 in damages against the City. At the trial, the presiding judge ruled that Landahl could not introduce evidence of any loss except that of actual dollars expended. In particular, it could not recover the loss of profits. The Landahl evidence showed $266,000 in actual dollars expended, and the jury returned a verdict for the exact amount admitted into evidence. The case was not tried until 1984 and by that time Landahl had lost the land for the seven sites by forclosure, and all of its assets were invested in the seven buildings. Equitable relief, even if granted within 90 days of the stopping of construction, would not have benefited Landahl, especially in view of the 1975 economy.

The trial judge was of the opinion that Landahl could recover money damages against the City for the wrongful revocation of the building permits, and so instructed the jury. The jury returned a quick verdict for Landahl for exactly the amount the Court permitted Landahl to introduce into evidence as damages.

The City appealed the judgment to the Second District Court of Appeal of Florida, alleging procedural issues.[2] That Court, *sua sponte*, raised the issue of whether there was a cause of action against a municipality for damages for revoking a building permit, and held that the cause of action was limited to injunctive relief under the doctrine of equitable estoppel. App. C, at page 4. Landahl timely filed a motion for reconsideration which was denied. App. B.

Thereafter, Landahl timely petitioned the Supreme Court of Florida for a writ of certiorari. By decision entered December 10, 1985, the Supreme Court of Florida declined to accept jurisdiction of the case. App. A.

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2. The issues raised were that the City could not be brought into the action by a third party complaint, and if it could, Landahl's recovery, under the Florida Rules of Civil Procedure, was limited to the amount of the original plaintiff's complaint.

Argument

I. **Whether the City of Cape Coral in the application of its zoning or building code, in refusing to permit Landahl to continue to engage in construction under validly issued building permits in which Landahl had expended $266,000, effected a taking for which the Fifth Amendment requires the payment of money damages to compensate for such taking.**

II. **Whether the City of Cape Coral in the application of its zoning or building code, in refusing to permit Landahl to engage in construction under validly issued building permits in which Landahl had expended $266,000, engaged in an invalid exercise of the police power in violation of the due process clause of the Fourteenth Amendment and/or 42 U.S.C. § 1983.**

The reasons for granting this writ of certiorari are so closely related that they will be dicussed together as one argument.

Although this Court has on several occasions expressed its interest in the question as one justifying the granting of the writ of certiorari, it has never decided the issue of whether a governmental unit in the administration of its regulations may effect a "taking" for which the Fifth Amendment requires the payment of money damages to compensate for such taking. See *Williamson Planning Comm'n* v. *Hamilton Bank*, 473 U.S. ____ (1985). The Court also has never decided the issue of whether the revocation of a building permit under facts that constitute a violation of the due process clause of the Fourteenth Amendment and/or 42 U.S.C. § 1983 may require the payment of money damages in lieu of only injunctive relief. The Court, of course, has held under various other factual circumstances that the due process clause may justify money damages.

In the present case, the Trial Court recognized Landahl's right to money damages for wrongful revocation of a building permit, but the Second District Court of Appeals reversed, holding that money damages are not available and only injunction relief may be granted. In fact, however, no Florida case has previously held as its *ratio decidendi* that money damages are not recoverable. The Second District cited *Town of Largo* v. *Imperia Homes Corporation*, 309 So.2d 571 (Fla. 2d DCA 1975) in support of its decision but that case did not hold that money damages were not available, but only that injunctive relief was available.

It is to be remembered that Landahl's permits were revoked in 1975, but the case was not tried until 1984, nine years later. By this time, injunctive relief was tantamount to no relief at all and Landahl had lost the land by foreclosure. Most of Landahl's business activities were devoted to the seven high rise units in Cape Coral, and when the permits were revoked, Landahl lost everything. Equitable relief in Landah's case is no relief at all. *Memphis Light, Gas & Water Div.* v. *Craft*, 436 U.S. 1 (1978).

Other States have had results similar to that involving Landahl. Compare *154 East Park Ave. Corp.* v. *City of Long Beach*, 350 N.Y.S.2d 974 (1973) awarding money damages with 374 N.Y.S.2d 569, 438 N.Y.S.2d 288 (1981) denying money damages. State courts have been denying money damage relief in the vast majority of cases where zoning or construction on real estate has been involved. See, for example, cases collected at 49 A.L.R.3d 13. It is submitted that cases denying money damages as a matter of law where equitable relief is unsuited to resolve the matter and where money damages would otherwise be an appropriate remedy are in violation of the Fifth and Fourteenth Amendments.

The Fifth Amendment issue has been before the Court on other occasions: See *Williamson, supra; San Diego Gas & Electric Co.* v. *San Diego*, 450 U.S. 621 (1981); *Agins* v. *City of Tiburon*, 447 U.S. 255 (1980). In each case, after deciding that the issue warranted review by the Court, it was held that the question was not properly before the Court and was premature. It was held that the adminstrative remedies must be final, and they were not.

In *Williamson, supra* this Court stated:

> Even assuming that those decisions meant to refer literally to the Taking Clause of the Fifth Amendment, and therefore stand for the proposition that regulation may effect a taking for which the Fifth Amendment requires just compensation, see *San Diego*, 450 US, at 647-653, 67 L Ed 2d 551, 101 S Ct 1287 (dissenting opinion), and even assuming further that the Fifth Amendment requires the payment of money damages to compensate for such a taking the jury verdict in this case cannot be upheld. Because respondent has not yet obtained a final decision . . . 473 U.S. at ____.

Various Federal Circuits have found different implications and interpretations from the Fifth Amendment line of cases from this Court. The issues are significant and the conflict must be decided by this Court. The groundwork has been laid by the prior decisions. *Williamson, supra, San Diego Gas & Electric Co.* v. *San Diego, supra; Agins* v. *Tiburon, supra; Citadel Corp.* v. *Puerto Rico Highway Authority*, 659 F.2d 31 (1st Cir. 1982), *Barbian* v. *Panagis*, 694 F.2d 476 (7th Cir. 1982).

In *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393 (1922), this Court stated that governmental regulations affecting an owner's use of his property may constitute a taking. In *Pennsylvania Coal*, Justice Holmes maintained that "if regulation goes too far, it will be recognized as a taking." 260 U.S. at 415. Moreover, the taking clause was explicitly held applicable to zoning regulations in *Agins* v. *City of Tiburon, supra*, when this Court stated:

> The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests, see *Nectow* v. *Cambridge*, 277 U.S. 183 (1928), or denies an owner economically viable use of his land, see *Penn Central Transp. Co.* v. *New York City*, 438 U.S. 104, 138 n. 36, (1978)." 447 U.S. at 260.

This Court has recognized that a violation of 42 U.S.C. § 1983, and a violation of the due process clause justify an award of money damages, especially when equitable remedies are unsuited to resolve the matter. *Memphis Light, Gas & Water Div.* v. *Craft, supra.*

Landahl has obtained a final decision, contrary to previous cases heard by this court. The City issued building permits and then revoked them under a guise, as the jury found. This case is ripe for decision by this Court.

This Court has recognized that a violation of 42 U.S.C. § 1983, and a violation of the due process clause justify an award of money damages, especially when equitable remedies are unsuited to resolve the matter. *Memphis Light, Gas & Water Div.* v. *Craft, supra.*

This Court should grant the writ of certiorari to provide direction and guidance to State courts in allowing money damages where a "taking" has been effected, and the result should be the same regardless of whether the relief is afforded under either the Fifth or Fourteenth Amendments, assuming the "taking" has occurred. The Court should also grant the writ as it will resolve the conflict between the Federal Circuits on the issue. The issue commands the attention of this Court.

The rights of developers are unclear, and the exposure of zoning, building and other governmental regulatory agencies is unknown. This uncertainty in the law and the need for clarification has been recognized by this Court by previously granting writs of certiorari on the question of money damages under the Fifth and Fourteen Amendments. In addition to the conflict in the Federal Courts, persons subject to zoning or holding a license or permit are being incorrectly denied money damages for acts that equate to a "taking." The rights and amount of money involved across the Nation is enormous, and the clarifying hand of this Court is needed.

The questions presented, transcend the particular factual situation and parties in this case. The entire planning scheme of every local government body across the country is being impacted as a result of the division in Federal Circuits. Compare *Citadel Corp.* v. *Puerto Rico Highway Authority, supra*, which held that money damages are not recoverable and only injunctive relif is available with *Hamilton Bank* v. *Williamson Planning Comm'n*, 729 F. 2d 402 (6th Cir. 1984) and *Barbian* v. *Panagis, supra*, which held money damages were recoverable.

Conclusion

It is submitted that the Court should grant Landahl's petition for writ of certiorari.

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Attorney for Petitioner

Supreme Court of Florida

TUESDAY, DECEMBER 10, 1985

LANDAHL, BROWN & WEED ASSOCIATES, INC.,

Petitioner,

v.

CITY OF CAPE CORAL,

Respondent.

CASE NO. 67,371

District Court of Appeal, Second District No. 84-2240

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution (1980), and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. p. 9.330(d).

OVERTON, MCDONALD, EHRLICH and SHAW, J.J., concur

ADKINS, Acting C.J., dissents

IN THE SECOND DISTRICT COURT OF APPEAL, LAKELAND, FLORIDA

JUNE 7, 1985

CITY OF CAPE CORAL, a Florida municipal corporation,

Appellant,

v. Case No. 84-2240

LANDAHL, BROWN & WEED ASSOCIATES, INC., a Virginia corporation,

Appellee.

Counsel for appellee having filed a motion for rehearing in the above-styled case, upon consideration, it is ORDERED that said motion is hereby denied.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

IN THE DISTRICT COURT OF APPEAL OF FLORIDA SECOND DISTRICT

CITY OF CAPE CORAL, a Florida municipal corporation,

Appellant,

v. CASE NO. 84-2240

LANDAHL, BROWN & WEED ASSOCIATES, INC., a Virginia corporation,

Appellee.

Opinion filed May 8, 1985.

Appeal from the Circuit Court for Lee County; James R. Thompson, Judge.

Richard V. S. Roosa of Aloia, Dudley, Roosa, Cottrell, Sutton & McIver, Cape Coral, for Appellant.

Edward D. Bunn, Bailey's Crossroads, for Appellee.

CAMPBELL, Judge.

Appellant, City of Cape Coral, appeals a final judgment which awarded damages of $266,254 to appellee, growing out of the allegations of its fourth amended third party complaint. The record we have is pitifully meager and the issues raised on this appeal do not really address the most glaring defects in appellee's attempts to state a viable cause of action against appellant. Nevertheless, we conclude the judgment for appellee must be reversed and, on remand, a judgment for appellant shall be entered. We are, to say the least, appalled that the principles of law that require this result are barely touched on in the briefs or in the record below.[PA-1]

The original action below began as a mechanic's lien action by a contractor against appellee for work performed and materials furnished on a development project that had been undertaken by appellee. The original mechanic's lien complaint sought $7,948.50 in damages for unpaid labor and materials. The development project which appellee was pursuing involved several high rise buildings on sites for which appellant had issued building permits. During the initial phases of construction, it was necessary for appallent to issue several extensions of the building permits. Eventually, the permits were revoked and the project apparently abandoned. No action based on equitable estoppel was ever pursued by appellee in an attempt to salvage the building permits.[PA-2] Apparently, prior to the revocation of the permits, there had been changes in the applicable building code which prevented the development project, at least as originally envisioned. No actions or appeals concerning those building code changes appear to have been pursued.

Petitioner's Annotation

PA-1. Feeling defensive, Landahl would point out that the appeal was filed by the City who selected the issues. Landahl would not raise such issues.

PA-2. The complaint against the City had one separate Count of the complaint entitled "EQUITABLE ESTOPPEL," requesting injunctive relief, but the Second District ignored this. The case was tried on the money damage issue.

In its various third party complaints, appellee joined appellant in the action seeking indemnity for any damages it might owe the mechanic's lien complainant and $10,000,000 in damages for revocation of the building permits and the subsequent failure of the construction project. Ultimately, the mechanic's lien complainant and appellee entered into a joint motion for dismissal of that action leaving only the third party actions against appellant.

The third party action went to jury trial as a result of appellee's fourth amended third party complaint. Appellant field various motions to dismiss directed to the various third party complaints. Finally, after the dismissal of the original mechanic's lien action, appellant filed a motion for a judgment on the pleadings. It was at this point, if not before, that the trial judge should have entered judgment for appelant.

It also appears that a motion to dismiss with prejudice should also have earlier been granted. However, we are not sure, because of the meager record, that the proper grounds were presented to the trial judge to support the motions to dismiss. Be that as it may, on the motion for judgment of the pleadings, it should have been clear that there was a failure to state a proper cause of action against the municipal appellant. Fla.R.Civ.P.1.140(h)(2). Appellant was clearly entitled to a judgment as a matter of law and the motion for judgment on the pleadings should have been granted. *Shay* v. *First Federal of Miami, Inc.*, 429 So.2d 64 (Fla. 3d DCA 1983). Appellee's fourth amended third party complaint attempts to state a cause of action against appellant in some seven counts, none of which will support a claim for damages against this municipal appellant. All of the claims seek damages growing out of the revocation of building permits.

First of all, there is no cause of action for the manner in which a municipality exercises its governmental function of issuing or refusing to issue permits. *Trianon Park Condominium Association, Inc.* v. *City of Hialeah*, No. 63,115 (Fla. Apr. 4, 1985)[10 FLW 210]. Thus, those actions of a municipality are immune from an action for damages. That is not to say, however, that a party does not have a right to relief from the wrongful refusal or revocation of a building permit. That cause of action is limited though to an action to acquire or retain the permit on the grounds of equitable estoppel. *Town of Largo* v. *Imperial Homes Corporation*, 309 So.2d 571 (Fla. 2d DCA 1975).

We, therefore, reverse the judgment entered for appellee in the trial court below, remand and direct entry of a judgment for appellant.

OTT, A.C.J., and HALL, J., Concur.

IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT IN AND FOR LEE COUNTY, FLORIDA

CIVIL ACTION

GILVESY CONSTRUCTION, INC.

Plaintiff

vs. Case No. 75-1907CA

LANDAHL, BROWN & WEED ASSOCIATES, INC., et al.

Defendants

FINAL JUDGMENT

Persuant to the verdict rendered in this action

IT IS ADJUDGED that Landahl, Brown & Weed Associates, Inc. recover from the City of Cape Coral the sum of $266,254.00.

ORDERED at Ft. Myers, Florida on the 14 day of August 1984.

JAMES R. THOMPSON
JUDGE